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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

REPLY COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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March 25, 1996

SUMMARY

The initial comments make clear that the FCC has the authority and the responsibility to ensure that telecommunications carriers using the incumbent local exchange carriers' ("ILECs'") networks pay nondiscriminatory cost-based rates. Specifically, the Telecommunications Act of 1996 ("1996 Act") directs the Commission to develop a comprehensive set of regulations to implement its interconnection provisions. The State commissions have the important role of approving interconnection arrangements between ILECs and other telecommunication carriers. In addition, the States may, under the 1996 Act, enforce their own orders, policies and rules laws with respect to interconnection. However, it is equally true that, when approving interconnection agreements or enforcing their own interconnection policies, State commissions must act in a manner that is consistent with the provisions of the 1996 Act and the Commission's implementing regulations authorized thereunder. Accordingly, contrary to the arguments of the ILECs, the FCC can and must issue regulations to govern the costing and pricing of ILEC interconnection which the States must follow.

In the specific context of interconnection between commercial mobile radio service ("CMRS") providers and the ILECs, the record reveals a dispute over the interrelationship between the 1996 Act and federal preemption of state regulation of CMRS rates and entry under Section 332(c)(3) of the Communications Act of 1934. The ILECs contend that Sections 251 and 252 govern CMRS-ILEC interconnection completely, just as they govern interconnection with every other type of carrier. Pursuant to these Sections, the ILECs contend, the State commissions have the principal role in the regulation of interconnection. The FCC may adopt only very general guidelines regarding cost standards and pricing, these commenters conclude.

On the other hand, the large majority of CMRS interests argue that Section 332(c)(3) of the Communications Act supports preemption of all State oversight over the rates of both a CMRS provider and an incumbent LEC when the two interconnect. Thus, the State commission arbitration and approval provisions of Sections 251 and 252 simply do not apply, these parties assert.

CompTel submits that both sides of the argument are right, but only in part, and that Sections 251, 252, and 332(c)(3) are fully reconcilable. By their terms, Sections 251 and 252 -- which call on the FCC to adopt firm standards and principles -- govern the interconnections rates charged by incumbent LECs in agreements with all other telecommunications carriers, including CMRS providers. However, the States are expressly preempted from regulating the rates charged by CMRS providers, including those for interconnection, under Section 332(c)(3). Accordingly, the FCC must adopt mandatory guidelines for the State commissions to follow when fulfilling their responsibilities under Section 252 of the 1996 Act, including the criteria by which ILECs' rates for use of their networks by other telecommunications carriers will be considered cost-based, just, reasonable, and nondiscriminatory. The FCC should promptly formulate these standards by commencing and completing its Section 251(d) interconnection rulemaking in conjunction with the long-promised access charge proceeding.

The Commission must also adopt guidelines that circumscribe state action when reviewing ILEC-CMRS interconnection agreements so as to preserve the federal preemption of state regulation of CMRS entry and rates set forth in Section 332(c). As a result of this regulatory framework, the States will be able to fulfill their Section 252 responsibilities as they apply to ILEC-CMRS interconnection without running afoul of Section 332(c)(3).

TABLE OF CONTENTS

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The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby replies to the initial comments filed in response to the FCC's Notice of Proposed Rulemaking in the above-captioned matter ("Notice").[1]

I. INTRODUCTION

In its Reply, CompTel focuses on the jurisdictional debate that emerged from the initial comments. What is at stake in this debate is the extent to which implementation of new Sections 251 and 252 introduced by the Telecommunications Act of 1996 ("1996 Act")[2] is compatible with the FCC's preemption of state entry and rate regulation of commercial mobile radio services ("CMRS") under Sections 201 and 332(c) of the Communications Act of 1934 ("Communications Act"). As amplified herein, when read together, these various statutory provisions support CompTel's conclusion that the FCC has the authority and the responsibility to adopt national cost standards and pricing regulations for use of the

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[1] FCC 95-505 (released January 11, 1996).

[2] Pub. L. No. 104-104, 110 Stat. 56 (1996).

incumbent local exchange carrier ("ILEC") networks by all telecommunications carriers. The FCC should promptly formulate these standards by commencing and completing its Section 251(d)(1) interconnection proceeding in conjunction with the agency's long-promised access charge reform proceeding. By resolving the jurisdictional dispute in the manner outlined herein, the FCC will properly balance the various statutory responsibilities of the Commission and the State commissions and help ensure that rates paid by CMRS providers and all other telecommunications carriers for use of the ILEC networks are cost-based, just, reasonable, and non-discriminatory.

II. GENERAL COMMENTS

In its initial comments, CompTel explained how the unbundling and interconnection provisions of the 1996 Act called for the opening of the ILEC networks so that they could be used by all telecommunications carriers for the provision of telecommunications services.[3] Numerous other parties agreed that the availability of the ILEC networks to other carriers is a cornerstone of the new legislation.[4] Central to this opening of the networks is the need for the ILECs to treat all carriers in a non-discriminatory manner. In particular all carriers must pay the same cost-based rates as other carriers whenever they use the ILEC network in the same way.[5] What the 1996 Act requires, in short, is that all carriers be subject to the same regulatory considerations to the extent that their use of the ILEC network is functionally equivalent.[6]

Interestingly enough, a number of the Bell Operating Companies ("BOCs") and other ILECS agree that the 1996 Act requires that all carriers be treated the same for purposes of use of the ILEC networks.[7] BellSouth, for example, submitted "that the Commission should

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[3] CompTel Comments at 4-7.

[4] *E.g.* Comments of MCI Telecommunications Corporation ("MCI") at 6, 16-17; Comments of Bell Atlantic NYNEX Mobile, Inc. at 9 n.10.

[5] *E.g.*, Comments of LDDS WorldCom at 16. Contrary to PacTel's assertion in its comments, similar prices for similar use of the network should not also depend upon different providers serving similar types of customers in the same geographic area. *See* Comments of Pacific Telesis ("PacTel") at 77. Such a policy would require all of the artificial regulatory distinctions that the 1996 Act eliminated. Pricing for interconnecting carriers, rather, should depend solely upon the costs the carrier imposes upon the network.

[6] Accordingly, it is simply intolerable that some CMRS providers are paying several times more for ILEC interconnection than landline competitive local exchange carriers. *See, e.g.*, Comments of AirTouch Communications, Inc. ("AirTouch") at 32-33.

[7] *E.g.*, Comments of BellSouth Corporation ("BellSouth) at 28, 39; Comments of SBC Communications, Inc. at v; Comments of PacTel at 58; Comments of US WEST at i.

apply uniform interconnection policies not only to all CMRS providers, but to all telecommunications carriers, wireless and wire-based."[8] However, this group of commenters reaches two conclusions from their reading of Sections 251 and 252 that are simply unwarranted. First, these commenters assert that the FCC has extremely limited jurisdiction under the new Act to adopt cost standards or pricing requirements applicable to ILEC charges for use of their network. Rather, these parties contend, the State commissions have the authority to determine the adequacy of any required cost showings by the ILEC and the reasonableness of rates with the most minimal, and nonmandatory, guidance from the FCC.[9] Indeed, Bell Atlantic NYNEX Mobile contends that the FCC in its Section 251(d)(1) implementation proceeding should simply incorporate into its rules verbatim the provisions of Sections 251(a), (b), and (c).[10]

Second, these parties appear to suggest that the 1996 Act *sub silentio* wrote Section 332(c)(3) of the Communications Act out of existence.[11] In other words, despite the earlier prohibition against state regulation of CMRS rates (absent FCC approval) -- which prohibition was not amended by the 1996 Act -- these commenters maintain that Sections 251 and 252 put into the states' hands the authority to regulate CMRS interconnection rates.[12]

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[8] Comments of BellSouth at 39.

[9] *E.g.*, Comments of Bell Atlantic at 5; Comments of BellSouth at 9; Comments of GTE at 26-27; Comments of Ameritech at 12.

[10] Comments of Bell Atlantic NYNEX Mobile at 2-3.

[11] In its initial comments, CompTel focused on the rates charged by ILECs for use of their network and thus did not address the question of the FCC's continuing authority and responsibility under Section 332(c). CompTel addresses that issue herein in Section III.C, *infra*.

[12] *See, e.g.*, comments cited in note 9, *supra*.

As CompTel detailed in its initial comments, a careful and conciliatory reading of the 1996 Act's provisions leads inescapably to the conclusion that the FCC can and must adopt firm cost and pricing standards that govern use of the ILEC networks by telecommunications carriers.[13] The adoption of such regulations is totally consistent with the States' responsibilities under the 1996 Act to approve voluntarily negotiated interconnection arrangements and to arbitrate and approve issues relating to such agreements that are not successfully negotiated. Moreover, as AirTouch noted, the FCC alone has the ability to forbear from enforcing Sections 251 and 252. As a result, the Commission has the ultimate authority over the statutory provisions establishing the framework in which the State commissions approve interconnection agreements.[14] At bottom, the parties arguing for an extremely limited federal role with respect to ILEC interconnection are simply ignoring the fact that Congress expressly directed the FCC, not the states, to issue regulations implementing Section 251, including those provisions referencing or referenced by the pricing standards in Section 252(d).[15]

Regarding the continued applicability of Section 332(c) in light of passage of the 1996 Act, CompTel demonstrates in more detail below that Sections 251, 252, and 332(c) are reconcilable. Together, these sections provide for the adoption of strong federal guidelines governing state review and approval of ILEC interconnection agreements along with

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[13] CompTel Comments at 9-15. *Accord. e.g.*, Comments of AT&T at 29 n.80; Comments of MCI at 14; Comments of PCIA at 25; Comments of Airtouch at 51; Comments of Paging Network, Inc. at 37-38.

[14] *See* Comments of AirTouch at 53. *See also* 47 U.S.C. §§ 10(d) and (e).

[15] *See, e.g.*, Section 251(b)(5), 251(c)(2), 251(c)(3), and Section 251(c)(4).

mandatory FCC requirements precluding the regulation of CMRS interconnection rates by the States.

III. COMPENSATION FOR INTERCONNECTED TRAFFIC

A. General Pricing Principles

In its comments, CompTel explained the importance of rational cost-based pricing principles to the emergence of full competition. Under the 1996 Act, all rates for use of the ILEC networks must be cost-based.[16] Cost-based pricing supports the fullest measure of competition and promotes efficient investment in telecommunications facilities. When the prices for services inputs, such as the use of the ILEC network, are not cost-based, the signals in the market place are distorted and carriers are forced to make uneconomic decisions.

The record created in this proceeding further supports the conclusion that the rates charged by ILECs for use of their networks must be cost-based. A number of commenters specifically argued for the adoption of total service long run incremental costs as the appropriate standard upon which ILEC prices for use of their networks should be based.[17] AT&T observed that "TSLRIC [total service long run incremental cost] provides LECs with an economically efficient level at which to set prices, thereby sending the correct entry and exit signals to existing and potential competitors."[18]

Several of the LECs suggest that TSLRIC can be used only to establish a price floor. These commenters, for example PacTel and GTE, contend that ILECs should be free to

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[16] In its initial comments, CompTel explained that "bill and keep" or zero-rate pricing may be adopted by regulators as a mutual compensation mechanism between ILECs and other telecommunications carriers (if voluntary negotiations between the parties fail) following a review of approximations of costs of terminating traffic on the respective carriers' networks. CompTel Comments at 17.

[17] *E.g.*, Comments of AT&T at 16; Comments of LDDS WorldCom at 4, 8-9; Comments of AirTouch at 10, 38, Comments of MCI at 9-10.

[18] Comments of AT&T at 16.

charge whatever the market will bear for interconnection,[19] provided they are recovering their direct economic costs. Already a tenuous position prior to passage of the recent legislation, such a pricing principle is wholly at odds with the framework of the 1996 Act. Section 252(d)(1) makes clear that rates for all forms of ILEC interconnection are to be based directly on costs plus a reasonable profit.[20] There is no room under Section 252 for pricing by ILECs at some indeterminate level above direct economic costs depending upon what the market will bear. While the competitors of the ILECs that must rely upon the incumbents' networks would suffer under such pricing, the true losers would be consumers, as they would be deprived of the full benefits of competition that cost-based pricing would foster. Accordingly, ILEC costs determined pursuant to the FCC's implementing regulations must serve as more than a price floor. Rather, prices for use of the ILEC network must reflect the costs imposed by that use under the cost standard implemented under Sections 251 and 252.[21]

B. Negotiations and Tariffing

The bulk of carriers support negotiation as the principle method by which ILEC-CMRS interconnection should be arranged.[22] Indeed, the Communications Act, as amended

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[19] Comments of PacTel at 20, 44 ff.; Comments of GTE at 32-34.

[20] 47 U.S.C. § 252(d)(1).

[21] The use of a pricing standard based upon direct economic costs, such as TSLRIC, does not mean, as PacTel suggests, that LECs will not be able to recover their overhead costs. *See* PacTel at 45. The 1996 Act addresses only rate elements for inputs into other carriers' telecommunications services. Like all other telecommunications carriers, the ILECs will have the opportunity to recover overhead through their retail services.

[22] Comments of AT&T at 17; Comments of Bell Atlantic NYNEX Mobile at 9; Comments of AirTouch at 40; Comments of BellSouth at 5.

by the 1996 Act provides a framework of negotiations.[23] Section 252 unequivocally contemplates that each ILEC will enter into good faith negotiations whenever it receives from another telecommunications carrier "a request for interconnection, services, or network elements pursuant to Section 251."[24] CMRS providers are undoubtedly telecommunications carriers. Thus, there is no doubt that negotiated CMRS-ILEC interconnection arrangements are preferred.

Congress recognized, however, that negotiations would not always be successful, and provided for arbitration by State commissions in the 1996 Act. Such proceedings are to be guided by Section 251 and the FCC's regulations adopted to implement Section 251.[25] Any rates determined by the State commissions pursuant to Section 252(d) in the course of arbitrating the disputed portions of the agreement would have to be consistent with those implementing regulations.

Whether an ILEC interconnection arrangement is arrived at through negotiation, arbitration, or a combination of both, it must be approved (by the State PUC or, in certain circumstances, the FCC) and placed on file for public review.[26] The interconnection, service, or network elements in such agreements are to be available to other requesting

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[23] *E.g.*, Section 251(c)(1) (ILECs and requesting carriers have duty to negotiate in good faith).

[24] 47 U.S.C. § 252(a)(1); *see also* § 252(c)(1).

[25] 47 U.S.C. §§ 252(c)(1) (State arbitrations regarding interconnection to be consistent with Section 251 and the FCC's implementing regulations) and 252(e)(2)(B) (State approvals of arbitrated agreements to be consistent with Section 251 and the FCC's implementing regulations). Alternatively, under Section 332(c)(1)(B), CMRS providers may seek an order from the FCC requiring a LEC to interconnect with the physical facilities of the CMRS provider.

[26] 47 U.S.C. §§ 252(e) and (h).

telecommunications carriers on the same terms and conditions.[27] Thus, there should be no doubt that the 1996 Act resolves the issue of whether the terms and conditions of ILEC interconnection are to be negotiated (whether with CMRS providers or other telecommunications carriers) and made publicly available.

C. Jurisdictional Issues

The question of the FCC's jurisdiction to regulate CMRS-ILEC interconnection arrangements -- or ILEC interconnection arrangements of any kind -- is one of the most intensely contested issues in the record. As a general matter, the comments were divided into two broad camps. On the one hand, the CMRS providers contend that the FCC has preempted the field of CMRS rate regulation under Section 332(c). Such preemption, these parties argue, requires the FCC also to assert jurisdiction over the interconnection rates charged by ILECS *to* CMRS providers.[28] These parties for the most part claim that the new Sections 251 and 252 simply do not apply to ILEC-CMRS interconnection.[29]

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[27] 47 U.S.C. § 252(i).

[28] The basis for this assertion is two-fold: (1) a dual jurisdictional review of LEC-CMRS arrangements is unworkable, and (2) the rates a LEC charges are inputs to CMRS services, such that regulation of CMRS rates includes, by necessity, regulation of LEC interconnection rates charged to CMRS providers.

[29] *E.g.*, Joint Comments of Sprint Spectrum/APC at 40, 43; Comments of Sprint Corporation at 14-15; Comments of Vanguard Cellular Systems, Inc. at 23. While some parties contend that the 1996 Act "reinforces" the FCC's authority under Section 332(c)(3), it is still apparent that these parties do not believe that CMRS-ILEC interconnection is subject to Sections 251 and 252 of the new legislation. These parties, for example, do not acknowledge that such interconnection agreements are to be public filed and made publicly available pursuant to Sections 252(h) and (i). *See, e.g.*, Comments of PCIA at 12-14 (discussing only Sections 203 and 211 of the Communications Act as models for public disclosure of ILEC-CMRS arrangements).

On the other hand, the ILECs contend generally that CMRS-ILEC interconnection is governed solely by Sections 251 and 252 of the Act.[30] Moreover, these carriers argue that the states alone, by virtue of their responsibility to review interconnection agreements that ILECs enter into with telecommunications carriers, have jurisdiction over the rates contained within these agreements. According to these parties, the FCC is free to act only when the State commission fails to carry out its responsibilities.

As shown below, while Sections 251 and 252 on their face apply to CMRS-ILEC interconnection, these provisions must be read in a way that preserves the Commission's authority under Sections 332 and 201. Such a reading is possible but the conclusion is exactly the opposite of the one reached by the ILECs. Namely, Sections 251 and 252 complement Sections 332 and 201 such that it is the FCC that has the authority and responsibility to adopt costing standards and pricing guidelines for ILEC rates. These standards and guidelines will be implemented by the states in turn. Further, it is indisputable that the FCC alone has statutory authority over rates charged "by" CMRS providers. Pursuant to that authority, the FCC can issue guidelines that are sufficiently precise regarding the rates charged by CMRS providers that the states would be obligated to follow.[31] CompTel wants to emphasize that it is not suggesting that the FCC prescribe CMRS interconnection rates or revisit its decision to forbear from most Title II regulation of CMRS. Rather, the FCC's guidelines should specifically delineate what the states may not do when reviewing the CMRS-ILEC arrangements, consistent with the proscriptions in

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[30] Some parties allow for the conclusion that the FCC may regulate the rates CMRS providers charge ILECs for interconnection, but not the other way around. *E.g.*, Comments of NYNEX at 41 (citing the position of BellSouth). *See also Notice* ¶ 52.

[31] *See Notice* ¶ 110.

Section 332(c)(3) and 253 against state regulation of entry by CMRS providers and the rates they charge.

1. Sections 251(c) and 252 are concerned solely with regulation of rates charged by incumbent LECs, not CMRS.

As CompTel explained in its initial comments, the 1996 Act sets up a new regulatory framework designed to make the ILEC networks available as a resource to other telecommunications carriers for the provision of their services.[32] Concomitantly, to the extent these sections speak about the regulation of rates, it is, with one minor exception, limited to *the rates charged by ILECs*:[33]

- Sections 251(c)(2)(D) and 252(d)(1): the rates, terms, and conditions imposed by ILECS for interconnection for purposes of exchange access and local exchange service must be cost-based,[34] just, reasonable, and nondiscriminatory.

- Sections 251(c)(3) and 252(d)(1): the rates, terms, and conditions imposed by ILECS for access by any telecommunications carrier to unbundled network elements for the provision of telecommunications services must be cost-based,[35] just, reasonable, and nondiscriminatory.

- Section 251(c)(6): mandatory collocation of requesting telecommunications carriers facilities with ILEC facilities should be on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

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[32] Comptel Comments at 4-7.

[33] The single exception to the statement that Section 251 and 252 explicitly affect only the regulation of rates of *incumbent LECs* is that Section 251(b)(4) requires *LECs* to afford access to competitors to their rights of way on rates, terms, and conditions consistent with Section 224 of the Communications Act of 1934.

[34] The cost-based requirement applies to arbitrated interconnection agreements and to FCC review of a BOC's competitive checklist, the approval of which is a precondition to the BOC's providing in-region interLATA services. *See* 47 U.S.C. §§ 252(a)(1) and 271(c)(2)(B)(i).

[35] *See* previous footnote and Section 271(c)(2)(B)(ii) added by the new Act.

- Section 252(d)(2): the pricing standard concerning mutual compensation is to be applied "[f]or the purposes of compliance *by an incumbent local exchange carrier.*" (emphasis added)

- Sections 251(c)(4) and 252(d)(4): standards for determining wholesale rates, terms, and conditions of incumbent LECS.

- Section 252(f): approval of BOC statement of generally available terms and conditions for interconnection, unbundled network elements, resale, and other requirements of Section 251. The BOCs are a subset of all ILECs. *See also* Section 271(c)(2)(B) (BOC fourteen-point competitive checklist).

- Section 252(i): ILECs must make available any interconnection, services, or network elements in a Section 252-approved agreement to "any other requesting telecommunications carrier" upon the same terms and conditions as those provided in the agreement.[36]

Thus, the new Act creates a comprehensive framework for review of *incumbent LECs'* rates for the use of their networks to the extent that such charges are not the result of voluntarily negotiated arrangements. The 1996 Act does not contemplate the regulation of the rates charged by CMRS providers or other telecommunications carriers in the same way. Indeed, it is fair to say that the FCC's regulation of the rates charged by these non-ILEC entities is the same as before passage of the recent legislation, *i.e.*, pursuant to Section 201 of the Communications Act of 1934 (rates for interstate services must be just and reasonable) and other relevant sections.[37]

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[36] While paragraph (i) of Section 252 speaks of "[a] local exchange carrier" rather than an ILEC, in context this must be read as *incumbent* LEC. The use of the term "any other requesting telecommunications carrier" can only be understood in conjunction with the use of the term "requesting telecommunications carrier" as used in Sections 251(c)(1), (c)(2), and (c)(3), and Section 252(a)(1). These other subsections specifically refer to the requests by telecommunications carriers made to incumbent LECs.

[37] 47 U.S.C. § 201(a); *see also* 47 U.S.C. § 251(i) (Section 201 neither limited nor enlarged).

2. The States have no jurisdiction to regulate the rates charged by CMRS providers.

With regard to rates charged by CMRS providers, of course, the FCC's jurisdiction is more comprehensive as set forth in the regulatory framework of Sections 152(b) and 332(c) of the Communications Act. There is no doubt, as the overwhelming majority of all non-LEC commenters maintain, that Section 332(c)(3) precludes the states from regulating the rates charged by CMRS providers for commercial mobile services. To regulate CMRS rates, a state must successfully petition the FCC for the ability to do so under the standards in Section 332(c)(3)(A)(i) or (ii). To date, the FCC has entertained at least seven such petitions and denied them all.[38]

As a number of parties have explained, Sections 251 and 252 do *not* affect the Section 332(c)(3) proscription against state regulation of CMRS rates and entry.[39] Indeed, Sections 251 and 252 do not mention Section 332 at all. This is hardly surprising because, as explained above, Sections 251 and 252, to the extent they mention the regulation of rates, are concerned with the rates of *incumbent* LECs for the use of their networks by other carriers. Moreover, Section 253, while concerned with eliminating State erected barriers to entry by new carriers, makes clear that Congress intended Section 332(c)(3) to continue to apply unchanged.[40]

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[38] *E.g.*, Louisiana Public Service Commission, 10 F.C.C. Rcd 7898 (1995).

[39] *E.g.*, Comments of PCIA at 25-26.

[40] 47 U.S.C. § 253(e).

3. Settled principles of statutory construction require Sections 251, 252, and 332(c)(3) to be reconciled, if possible.

Because Section 252 requires interconnection arrangements between ILECs and other telecommunications carriers, such as CMRS providers, to be submitted to State regulators for approval, there appears to be a conflict with Section 332(c)(3). According to well-established canons of statutory construction, all provisions of a statute are to be interpreted as having meaning. As the Court of Appeals for the District of Columbia Circuit recently stated,

> we are to construe statutes, where possible, so that no provision is rendered "'inoperative or superfluous, void or insignificant.'" *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1285 (D.C. Cir. 1983) (quoting 2A DALLAS SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1973)). Moreover, we are to attempt to reconcile two statutes on the same subject, so that one does not repeal the other by implication. *United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939). Finally, we are to prefer the more specific statute over a conflicting general one. *United States v. Chase,* 135 U.S. 255, 260, 10 S.Ct. 756, 757, 34 L.Ed. 117 (1890).[41]

Thus, provisions in the 1996 Act in apparent conflict should not be read as repealing any pre-existing provision of the Communications Act *sub silentio* unless the two cannot be satisfactorily reconciled.[42] If, in fact, they cannot be reconciled, then the more particular provision takes precedence over the more general provision. As explained below, however,

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[41] Mail Order Association of America v. U.S. Postal Service, 986 F.2d 509, 515 (D.C. Cir. 1993). *See also* Morton v. Mancari, 417 U.S. 535, 551 (1974) ("[w]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective").

[42] "[R]epeals by implication are not favored." *Morton v. Mancari*, *supra*, 417 U.S. at 549-50.

Sections 251, 252, and 332(c)(3) can be reconciled. There is no reason to determine which provision takes precedence over the other.[43]

4. The FCC should adopt guidelines to govern both sides of CMRS-ILEC interconnection.

Most parties commenting on the *Notice* take diametrically opposed positions on the applicability of Sections 251 and 252, on the one hand, and Section 332(c)(3), on the other hand, to LEC-CMRS interconnection. Numerous BOCs and LECs proceed as through Section 332(c)(3) has been written out of the Communications Act by the recent legislation. They base this on the fact that CMRS providers are "telecommunications carriers" under the 1996 Act and that ILEC interconnection arrangements with telecommunications carriers are to be submitted to the State commissions for approval.[44] While these premises are correct, for reasons explained more fully below, the LECs' conclusions do not necessarily follow. Indeed, because Sections 251, 252, and 332(c)(3) are to be reconciled, if possible, these conclusions *cannot* follow.

By the same token, a number of CMRS providers and related interests proffer a reading of the 1996 Act that essentially ignores the fact that CMRS providers are "telecommunications carriers." They contend that Section 332(c)(3) precludes State commission review and approval of ILEC-CMRS interconnection arrangements, both with

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[43] While BellSouth purports to address the statutory construction issue, it inappropriately assumes a conflict between Sections 251 and 201 *before* trying to reconcile the two provisions. *See* BellSouth at 12-13.

[44] *E.g.*, Comments of NYNEX at 4-7; Comments of US WEST at 59-62; Comments of GTE at 10-12; Comments of Bell Atlantic at 5; Comments of BellSouth at 10. BellSouth and others also contend that termination by CMRS providers of ILEC-originated calls is not CMRS, and therefore not covered by Section 332(c)(3). BellSouth at 34. By this same argument, termination of CMRS originated calls on the ILEC networks *is* CMRS. Surely, BellSouth would not agree with this result.

respect to CMRS rates *and the ILEC interconnection rates as well.*[45] Two principal justifications are offered for FCC regulation of ILEC interconnection rates in the context of arrangements with CMRS providers. First, in order to regulate CMRS rates, these commenters assert the FCC must be able to regulate the interconnection rates of ILECs which are inputs to CMRS services.[46] Second, these commenters suggest that a dual jurisdiction system where ILEC interconnection rates are regulated by the state PUC, and CMRS rates are regulated by the FCC, is unworkable.[47] Thus, these parties conclude, even though CMRS providers may meet the definition of "telecommunications carriers," ILEC-CMRS interconnection arrangements need not be, in fact cannot be, approved by State PUCs.

Fortunately, Section 332(c)(3) and Sections 251 and 252 can be reconciled. Specifically, pursuant to its jurisdiction over the rates charged by CMRS providers, the Commission could promulgate detailed federal requirements that would effectively circumscribe state action regarding those rates. Because these requirements would be promulgated under Section 201, as well as Section 332, the State commissions would be precluded, when carrying out their Sections 251 and 252 responsibilities, from acting contrary to those requirements.[48] Further, this approach would be consistent with the FCC's "third alternative" for a regulatory framework for CMRS-LEC interconnection

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[45] *E.g.*, AT&T Comments at 22, 24;

[46] *E.g.*, Comments of PCIA at 17; Comments of Vanguard Cellular Systems, Inc. at 24; Comments of Century Cellnet at 13.

[47] *E.g.*, Comments of Sprint Spectrum/APC at 38-39.

[48] *See* 47 U.S.C. § 252(d)(3)(C).

discussed in the *Notice*, which the FCC concludes it has the authority to implement.[49] At the same time, this would not contravene Sections 251 and 252 which are concerned with the regulation of ILEC rates, as demonstrated above.

Pursuant to this approach, CMRS-ILEC interconnection arrangements would be submitted to the State commission for approval or review, but the State, in effect, would only be able to reject the agreement on the basis of the ILEC interconnection rates charged *to* the CMRS provider. These guidelines would be broad enough to cover both voluntarily negotiated and arbitrated agreements.[50]

In contrast, with respect to arbitrating, reviewing, and approving the ILEC interconnection rates, the State commissions will have as much freedom with respect to a CMRS-ILEC arrangement as with ILEC agreements with any other telecommunications carrier. Of course, regarding all of these scenarios, the FCC must issue mandatory federal guidelines in its Section 251(d)(1) rulemaking which the states must follow, as CompTel explained above and detailed in its opening comments.

In sum, the FCC should issue mandatory federal interconnection guidelines that (i) sufficiently circumscribe state regulation to permit consistency with the proscription of state CMRS rate regulation in Section 332(c)(3), and (ii) sufficiently spell out the parameters under which rates for use of the ILEC networks comply with Sections 251 and 252,

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[49] *See Notice* ¶ 110 (discussing the concept of specific parameters on state action regarding interconnection rates).

[50] For purposes of arbitrating CMRS-ILEC interconnection disputes, State commissions would be limited under federal requirements to arbitrating issues relating to ILEC rates, terms, and conditions. If ILECs believe that the CMRS interconnection rates are unjust, unreasonable, or discriminatory, they would be free, as they are now, to file a compliant under Section 208 of the Communications Act. 47 U.S.C. § 332(c)(1)(A).

particularly those requirements that rates for interconnection and access to unbundled network elements be cost-based, just, reasonable, and nondiscriminatory.

IV. CONCLUSION

For the foregoing reasons, the FCC should proceed to promulgate mandatory guidelines governing State approval of arrangements between ILECs and other telecommunications carriers. These guidelines must address with particularity the conditions under which ILEC rates for interconnection and unbundled network elements are cost-based, just, reasonable, and nondiscriminatory. The Commission should also proceed to adopt guidelines circumscribing State action with respect to CMRS rates when reviewing CMRS-ILEC interconnection agreements to ensure compliance with Section 332(c)(3).

Respectfully submitted,

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March 25, 1996